DEC 27 1993

No. 92-9059

In The

Supreme Court of the United States

October Term, 1993

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

DAVID I. BRUCK*
Attorney at Law
(Appointed by this Court)

P. O. Box 11744
Columbia, South Carolina 29211
(803) 765-1044

M. ANNE PEARCE
Assistant Appellate Defender

1122 Lady Street
Suite 940
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Petitioner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App.), *cert. denied*, 112 S.Ct. 448 (1991) 5

Gregg v. Georgia, 428 U.S. 153 (1976) 1

Knox v. State, 744 S.W.2d 53 (Tex. Crim. App. 1987), *cert. denied*, 486 U.S. 1061 (1988), *habeas relief granted*, 928 F.2d 657 (5th Cir. 1991) 5

State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972) 3

State v. Bey, 129 N.J. 557, 610 A.2d 814 (1992) 4

State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990) 5

State v. Mills, 62 Ohio St.2d 357, 582 N.E.2d 972 (1992) 5

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) 1

CONSTITUTIONAL AND STATUTORY PROVISIONS:

1993 N.C. Sess. Laws Ch. 538 §§ 29, 56 5

1993 N.J. Sess. Law Serv. Ch. 27 (West) 4

1993 Tex. Sess. Law Serv. ch. 900 § 5.02 (Vernon) 5

1993 Tex. Sess. Law Serv. ch. 900 § 6.01 (Vernon) 5

Ky. Rev. Stat. Ann. § 532.030 (Michie 1990) 4

N.C. Gen. Stat. § 15A-2002 (Michie Supp. 1993) 5

N.J. Stat. Ann. 2C:11-3(b)-(f) (West Supp. 1993) 4

Ohio Rev. Code Ann. § 2929.03(C)(2) (Page 1993) 5

TABLE OF AUTHORITIES – Continued

Page

S.C. Code Ann. § 24-21-640 (1993 Supp.) 1

S.C. Code Ann. § 24-21-950(D) (1989) 2

S.C. Code Ann. § 24-21-970 (1989) 2

S.C. Const. art. IV, § 14 (1976) 3

S.C. Gen. Assembly, H.R. 4365, 110th Leg., 2d Sess. (1993) 2

S.C. Gen. Assembly, S. 932, 935, 110th Leg., 2d Sess. (1993) 2

Tex. Code Crim. Proc. Ann. art. 42.18 § 8(b)(2) (West Supp. 1993) 5

Tex. Pen. Code Ann. § 12.31(b) (West 1993) 5

OTHER AUTHORITY:

William Fox and Tim Flach, *Law Making More Eligible for Parole Comes Under Fire*, Greenville [S.C.] News, Dec. 1, 1993, at 1A 3

ARGUMENT IN REPLY

The only matters in the briefs of respondent and its *amici* that require reply are the following potentially misleading statements of fact and law.

> 1. *"First and foremost, at the time of trial, no state agency had ever determined that Simmons was going to be serving a sentence of life imprisonment without the possibility of parole."* Brief of Respondent at 95.

This assertion, though technically true, is irrelevant. Petitioner's ineligibility for parole is unequivocally established as a matter of South Carolina statutory law. S.C. Code Ann. § 24-21-640 (1993 Supp.); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315, 320 (1991). Presumably because no ambiguity about petitioner's actual ineligibility exists in this case, respondent did not question petitioner's ineligibility for parole at trial, on appeal, or in its brief opposing the petition for writ of certiorari, Sup.Ct.R. 15.1, and there is no basis upon which to do so now.[1]

---

[1] In a related vein, respondent also urges that the trial judge had no obligation to instruct the jury on the law governing its "life imprisonment" alternative because South Carolina's parole laws – like all human law – might change in the future. Brief of Respondent at 16, 37, 49, 97. This proves too much, since respondent's reasoning would destroy the legal basis of trial by jury, and would transform capital sentencing proceedings into something approaching lawless vigilantism, in which the only guidepost for the jury's sentencing discretion would be the irreversibility of death. *Cf. Gregg v. Georgia*, 428 U.S. 153 (1976). Moreover, the recent change to South Carolina's statutory definition of "prior violent crime" which respondent cites as proof of the impermanence of South Carolina's parole restrictions, Brief of Respondent at 16-17 n. 3, has not altered petitioner's

> 2. *"[T]he fact that an inmate is not parole eligible does not mean that he would never be released from prison. . . . Testimony was presented in camera that it could not be said that he would always remain behind bars."* Brief of Respondent at 48-49.

Respondent's attempt to show that South Carolina law does not ensure petitioner's continued confinement actually demonstrates the opposite. Respondent stresses that no *statute* precludes furlough or work-release for life-without-parole inmates, while glossing over the fact that state regulations do expressly prohibit work-release and almost all furloughs for such inmates. J.A. 15-16. The record indicates, moreover, that no parole-ineligible life term inmate has ever been furloughed. J.A. 16. As for a pardon, the relevant statute itself requires "the most extraordinary circumstances," S.C. Code Ann. § 24-21-950(D) (1989), and respondent's suggestion that petitioner might be pardoned while serving his life-without-parole sentence for capital murder is simply fanciful. Another South Carolina code section cited but not identified by respondent, Brief of Respondent at 48 n. 8, allows consideration for early release for "any inmate afflicted with a terminal illness where life expectancy is one year or less," S.C. Code Ann. § 24-21-970 (1989) – again, hardly a major factor in any rational assessment of petitioner's

---

own parole ineligibility in any way, and is in any event reasonably likely to be repealed by legislation already prefiled for the 1994 session of the South Carolina General Assembly by the chairman of the House Judiciary Committee, H.R. 4365, 110th Leg., 2d Sess. (1993), and by two members of the Senate Judiciary Committee. S. 932, S. 935, 110th Leg., 2d Sess. (1993).

potential future dangerousness, or of the retributive severity of South Carolina's life-without-parole sanction.[2]

> 3. *Any accurate instruction must include "commutation and clemency . . . [and] judicial modification of sentence."* Brief of *Amici Curiae* Idaho *et al.* at 3.

In making this argument, *amici* appear unaware that neither the executive nor the judiciary has the power to commute prison sentences under South Carolina law. S.C. Const. art. IV, § 14 (1976) (Governor may commute only death sentences); *State v. Best*, 257 S.C. 361, 186 S.E.2d 272 (1972) (sentencing judge lacks jurisdiction to modify sentence after expiration of term in which it was imposed).

---

[2] While respondent labors to convince the Court that parole ineligibility is a matter of relatively little consequence under South Carolina law, to at least one of respondent's attorneys the difference between parolable and non-parolable life imprisonment appears to be literally one of life and death. Denouncing the 1993 statutory curtailment of a different part of South Carolina's no-parole provisions as " 'a despicable act by someone who didn't want to debate the issue in public,' " Solicitor Harpootlian has recently announced that "he intends to seek the death penalty in a Richland County murder case because the victim's family is no longer guaranteed the killer faces life without parole if convicted of his second violent offense." William Fox and Tim Flach, *Law Making More Eligible for Parole Comes Under Fire*, Greenville [S.C.] News, Dec. 1, 1993, at 1A, 5A. Thus despite the assertions in his brief, the prosecutor in this case seems to understand the great importance of parole ineligibility as a facet of a capital murderer's punishment, and it is reasonable to suppose that an accurately instructed jury might have taken a similar view.

> 4. *"[T]he majority of the death penalty states do not instruct their capital juries on the issue of parole eligibility. A majority of these states do not instruct their juries beyond a "plain reading" of that state's death penalty statute."* Brief of *Amici Curiae* Idaho *et al.* at 6.

The first of these statements is incorrect and the second is misleading. As petitioner has already pointed out, all but a handful of life-without-parole states inform the jury of the true meaning of the life sentence alternative. Brief for Petitioner at 39-41 nn. 23-25. In most of these states, a "plain reading" of the death penalty statute is a wholly adequate means of achieving this, since the statutes themselves refer to the unavailability of parole for life-sentenced capital murderers. *Id.*, n. 23. Moreover, *amici*'s assertion to the contrary notwithstanding, even those relatively few states which still authorize parole for capital murderers generally inform sentencing juries of the parole restrictions imposed by state law. Of the six states that involve juries in capital sentencing and have no life without parole alternative, five – Kentucky, New Jersey, New Mexico, North Carolina and Ohio – require that the jury be informed of the time which must be served before parole eligibility.[3] Only Texas, which

---

[3] **Kentucky:** Ky. Rev. Stat. Ann. § 532.030 (Michie 1990) (jury must choose between death, life imprisonment with no parole eligibility for 25 years, life imprisonment with no parole eligibility for 12 years, or a term of not less than 20 years); **New Jersey:** 1993 N.J. Sess. Law Serv. Ch. 27 (West), N.J. Stat. Ann. 2C:11-3(b)-(f) (West Supp. 1993) (jury must be instructed that defendant will serve at least 30 years without parole if not sentenced to death); *State v. Bey*, 129 N.J. 557, 610 A.2d 814 (1992) (finding federal constitutional right to accurate

recently increased to 40 years the minimum term to be served by life-term capital murderers before parole eligibility, 1993 Tex. Sess. Law Serv. ch. 900 § 6.01 (Vernon), *amending* Tex. Code Crim. Proc. Ann. art. 42.18 § 8(b)(2), has yet to require jury instructions on parole ineligibility.[4] Although the practices of these jurisdictions are not directly relevant to petitioner's constitutional claim, the

---

information on minimum 30-year term of incarceration); **New Mexico:** *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990) (federal constitutional right to instruction on 30-year parole ineligibility for capital murderer sentenced to life imprisonment); **North Carolina:** 1993 N.C. Sess. Laws Ch. 538 §§ 29, 56 (amending N.C. Gen. Stat. § 15A-2002 (Michie-Supp. 1993), effective Jan. 1, 1995, to require capital sentencing instruction that "life imprisonment means a sentence of life with eligibility for parole consideration after 25 years"); **Ohio**: Ohio Rev. Code Ann. § 2929.03(C)(2) (Page 1993) (sentencing jury decides between death, life imprisonment without eligibility for parole for 30 years, and life imprisonment without eligibility for parole for 20 years); *State v. Mills*, 62 Ohio St.2d 357, 374-75, 582 N.E.2d 972, 987-88 (1992) (approving instructions on 30-year and 20-year eligibility).

[4] Interestingly, a Texas "truth-in-sentencing" statute requires that sentencing juries be given a wealth of information concerning defendants' parole and "good-time" eligibility in *non*-capital cases, 1993 Tex. Sess. Law Serv. ch. 900 § 5.02 (Vernon), *amending* Tex. Code Crim. Proc. Ann. art. 37.07, § 4 (West Supp. 1993), but capital cases are expressly excluded from the statute's effect, *id.*, § 4(b), and capital sentencing juries are told only that the defendant will be sentenced to "life imprisonment" if not sentenced to death. Tex. Pen. Code Ann. § 12.31(b) (West 1993); *Knox v. State*, 744 S.W.2d 53, 62-64 (Tex. Crim. App. 1987), *cert. denied*, 486 U.S. 1061 (1988), *habeas relief granted*, 928 F.2d 657 (5th Cir. 1991); *Boyd v. State*, 811 S.W.2d 105, 121 (Tex. Crim. App.), *cert. denied*, 112 S.Ct. 448 (1991).

general willingness of even these states to enlighten capital jurors concerning the limitations on capital murderers' parole eligibility makes South Carolina's refusal to instruct on that state's absolute prohibition of parole all the more difficult to understand.

CONCLUSION

The judgment of the South Carolina Supreme Court affirming petitioner's sentence of death should be reversed.

Respectfully submitted,

DAVID I. BRUCK
Attorney at Law
P. O. Box 11744
Columbia, South Carolina 29211
(803) 765-1044

M. ANNE PEARCE
Assistant Appellate Defender
1122 Lady Street
Suite 940
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Petitioner